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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R2-ES-2021-0041; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BE65

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Prostrate Milkweed and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are listing the prostrate milkweed (*Asclepias prostrata*), a plant species from Texas, as an endangered species and designating critical habitat under the Endangered Species Act of 1973, as amended (Act). We are designating approximately 661.0 acres (267.5 hectares) in Starr and Zapata Counties, Texas, as critical habitat for the prostrate milkweed under the Act. This rule adds this species to the List of Endangered and Threatened Plants and extends the Act's protections to the species and its designated critical habitat.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Our February 15, 2022, proposed rule and this final rule are available on the internet at *https://www.regulations.gov*. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *https://www.regulations.gov* at Docket No. FWS-R2-ES-2021-0041. For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are

available at *https://www.regulations.gov* at Docket No. FWS-R2-ES-2021-0041.

FOR FURTHER INFORMATION CONTACT: Chuck Ardizzone, Field Supervisor, Texas Coastal Ecological Services Field Office, 17629 El Camino Real Suite 211, Houston, TX 77058; telephone 281–286–8282. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the prostrate milkweed meets the definition of an endangered species; therefore, we are listing it as such and finalizing a designation of its critical habitat. Both listing a species as an endangered or threatened species and designating critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 et seq.).

What this document does. This rule lists the prostrate milkweed as an endangered species and designates approximately 661.0 acres (267.5 hectares) in Starr and Zapata Counties, Texas, as critical habitat for this species under the Act.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or

threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that competition from introduced invasive grass, habitat loss and degradation from root-plowing and conversion of native vegetation to improved buffelgrass pasture, habitat loss from right-of-way construction and maintenance from energy development and road and utility construction, and habitat loss from border security development and enforcement activities (Factor A), as well as the demographic and genetic consequences of small population sizes (Factor E), are threats to the prostrate milkweed.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as: (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

The critical habitat we are designating in this rule, in eight units comprising 661.0 acres (ac) (267.5 hectares (ha)), constitutes our current best assessment of the areas that meet the definition of critical habitat for prostrate milkweed.

Previous Federal Actions

On February 15, 2022, we published a proposed rule (87 FR 8509) in the *Federal Register* to list prostrate milkweed as an endangered species and to designate critical habitat for the species under the Act (16 U.S.C. 1531 et seq.). Please refer to that proposed rule for a detailed description of previous Federal actions concerning this species.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the prostrate milkweed. The SSA team was composed of Service biologists in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the *Federal Register* on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent peer review of the information contained in the SSA report. As discussed in the proposed rule, we sent the SSA report to six independent peer reviewers and received two responses. The peer reviews can be found at *https://www.regulations.gov.* In preparing the proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which was the foundation for the proposed rule and this final rule. A summary of the peer review comments and our responses can be found in the proposed rule (87 FR 8509; February 15, 2022).

Summary of Changes from the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public on our February 15, 2022, proposed rule (87 FR 8509). We did not make any substantial changes to this final rule after consideration of the comments we received. We did, however, make the revisions to the critical habitat designation described below based on new information.

In this final rule, we revise critical habitat Unit 2 to reflect recently constructed border wall, which reduces the area meeting the definition of critical habitat in that unit. Specifically, this change results in a decrease of 19.7 ac (8.0 ha) of critical habitat from what we proposed for Unit 2 on February 15, 2022 (87 FR 8509).

In this final rule, we also revise critical habitat Unit 5 to correct a map projection error of the national wildlife refuge tract boundary, which reduces the area of this unit. Specifically, this change results in a decrease of 10.6 ac (4.3 ha) of critical habitat from what we proposed for Unit 5 on February 15, 2022 (87 FR 8509).

Overall, these changes to Units 2 and 5 result in a net decrease of 30.3 ac (12.3 ha) in the critical habitat for prostrate milkweed from what we proposed on February 15, 2022 (87 FR 8509).

We also make minimal nonsubstantive clarifications and editorial corrections in this final rule.

Summary of Comments and Recommendations

In our February 15, 2022, proposed rule (87 FR 8509), we requested that all interested parties submit written comments on the proposal by April 18, 2022. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposed listing determination, proposed designation of critical habitat, and draft economic analysis. Newspaper notices inviting public comment were published in several local newspapers,

including *The Monitor* on February 21, 2022. We did not receive any requests for a public hearing. All substantive information provided during the comment period has either been incorporated directly into this final determination or is addressed below.

State Agency Comments

(1) Comment: Texas Parks and Wildlife Department commented that designating critical habitat on private lands where support for the designation is not confirmed could harm relationships with landowners and ultimately impede voluntary conservation efforts for listed species and lead to additional resource protection, management, and partnership challenges.

Our response: We place great value on our partnerships with private landowners. Because important areas for prostrate milkweed conservation can occur on private lands, collaborative relationships with private landowners are key to further recovery. Designation of critical habitat does not affect land ownership, establish any restrictions on use of or access to the designated areas, establish specific land management standards or prescriptions, or prevent access to any land. Further, the Act does not authorize the Service to regulate private actions on private lands, and landowners are not obligated to incur any costs related to the species' conservation or to alter their current land management. Therefore, the listing of prostrate milkweed and designation of critical habitat will not impact private landowners and thus will not impede conservation efforts.

The Service supports voluntary conservation through our Partners for Fish and Wildlife Program and understands concerns for landowner privacy regarding rare plant locations. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation. Voluntary conservation programs may provide technical or financial assistance to the

landowner. Private landowners may contact their local Service field office to obtain information about these programs.

(2) Comment: Texas Parks and Wildlife Department also commented that the benefits of excluding private lands from a critical habitat designation may outweigh the benefits of including those lands when the necessary landowner support has not been secured prior to such a designation.

Our response: According to our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016), we consider six elements when considering whether or not to exclude an area from critical habitat: (1) partnerships and conservation plans; (2) conservation plans permitted under section 10 of the Act; (3) national security and homeland security impacts; (4) Tribal lands; (5) Federal lands; and (6) economic impacts. We give great weight and consideration to the conservation benefits provided through permitted and non-permitted conservation plans, programs, and partnerships. We will generally exclude any area covered by non-permitted conservation where partnerships provide a benefit to the species and its habitat. A generalized concern regarding the potential impact to landowner support is not sufficient grounds for us to be able to undertake an analysis weighing the benefits of exclusion against the benefits of inclusion in considering an area for exclusion. Under the Services' Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 Federal Register 7226; February 11, 2016), a proponent of such an exclusion must provide a reasoned rationale for such exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced). Evidence of a permitted conservation plan or non-permitted conservation agreement and partnership would be required to demonstrate how the affected landowner(s) would provide a benefit to the species and its habitat. The commenter did not provide sufficient information for us to meaningfully evaluate the benefits of

exclusion of private lands. Accordingly, we did not consider any areas for exclusion based on the potential impact to landowner support.

(3) Comment: The Office of the Attorney General of Texas commented that we should not list prostrate milkweed as an endangered species or designate portions of the Texas border as critical habitat under the Act because it would have a significant impact on national security by preventing Texas's efforts to address the border crisis and national security, such as ongoing and future efforts to erect and establish deterrents to illegal border crossings, including, but not limited to, construction of a border barrier.

Our response: The Act requires us to make a determination using the best available scientific and commercial data after conducting a review of the status of the species. For prostrate milkweed, the best available scientific and commercial data indicate that the species is currently in danger of extinction and therefore we are required to list the species as endangered under the Act. For exclusion of an area from critical habitat designation, we follow our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016), which outlines measures we consider when excluding any areas from critical habitat. We reviewed the commenter's request and applied the February 11, 2016, Policy (81 FR 7226). Based on this analysis, we determined that the area should not be excluded from this final rule. Please see **Consideration of Impacts under Section 4(b)(2) of the Act**, *Exclusions Based on Other Relevant Impacts*, below, for our analysis of the Attorney General of Texas' request for exclusion for lands along the Texas border.

(4) Comment: The Office of the Attorney General of Texas commented that two environmental impact analyses conducted by U.S. Customs and Border Patrol have concluded that construction activity, such as building roads or a border wall, in the counties listed in the February 15, 2022, proposed rule would have minimal or no

significant impact on vegetation, including the prostrate milkweed, and, therefore, designating critical habitat is not needed to protect the species from this activity.

Our response: Occupied critical habitat is defined under section 3 of the Act as the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (PBFs) (I) essential to the conservation of the species and (II) which may require special management considerations or protection (16 U.S.C. 1532(5)(A)(i)). We find that the areas included in this final designation meet the first prong of the Act's definition of critical habitat; therefore, we must include them in the final designation unless the benefits of exclusion outweigh the benefits of inclusion. As discussed above in response to comment (3), we found that the benefits of exclusion did not outweigh the benefits of inclusion. Even if border construction activities will have minimal or no significant impacts to vegetation itself, critical habitat is meant to conserve all parts of the physical and biological habitat that are essential to prostrate milkweed. For a list of the PBFs, please refer to **Physical or Biological Features Essential to the Conservation of the Species**, below.

Once critical habitat is designated, we will continue to collaborate with DHS and CBP to ensure border security operations can still occur in areas designated as critical habitat for prostrate milkweed. To the best of our ability, we will work with other Federal agencies, including U.S. Customs and Border Patrol, to ensure actions they fund, authorize, or undertake are not likely to destroy or adversely modify critical habitat, including any of the PBFs essential to the conservation of the species. For prostrate milkweed, this includes destruction or adverse modification of soil that is well-drained and sandy overlying strata of sandstone or indurated caliche with a high gypsum concentration. However, designating critical habitat along the border would not impact CBP's ability to engage in border security operations in these areas.

Public Comments

We received numerous comments that prostrate milkweed is an important plant for migratory butterflies and should be protected. The commenters did not provide any new substantial information on prostrate milkweed's status or threats, and thus our critical habitat designation and determination that prostrate milkweed meets the definition of an endangered species under the Act did not change. Below, we provide a summary of the relevant public comments we received.

(5) Comment: One commenter stated we should designate critical habitat in the occupied areas along U.S. Highway 83 and immediately, prior to publishing the final rule, enter into section 7 consultation with Texas Department of Transportation regarding their vegetation removal in highway rights-of-way (ROWs).

Our response: As stated in the proposed rule (87 FR 8509; February 15, 2022), the degree and frequency of soil disturbance along U.S. Highway 83 has caused almost complete replacement of the native plant community with the introduced, highly invasive buffelgrass (*Pennisetum ciliare*). Maintenance operations for the highway, overhead powerlines, and communication cables located in trenches along the ROW will continue indefinitely, and it is likely that additional infrastructure will be installed in the ROW. The prostrate milkweed population in this ROW has declined from about 200 individuals, when it was discovered in 1988, to 3 or fewer individuals during the last 13 years. Further, PBFs 4 and 5 are no longer present along this improved highway ROW, and therefore we are not designating this area as critical habitat for the prostrate milkweed. We are also not including this area as unoccupied critical habitat because it located along a ROW with continuous disturbance that the species cannot withstand, and thus we are reasonably certain that this area will not contribute to the conservation of the species.

(6) Comment: One commenter stated that the Service and Texas Department of Transportation should remove buffelgrass and plant native species.

Our response: Addressing nonnative, invasive species may be valuable in conserving the prostrate milkweed. However, buffelgrass is an extremely difficult plant to control and manage. Efforts to eradicate buffelgrass in highway ROWs are unlikely to succeed because these areas are continuously disturbed for ROW operations and maintenance, making it difficult for native plants to establish and persist, and creating ideal circumstances for buffelgrass to reestablish. Therefore, we are focusing efforts on the conservation of prostrate milkweed in areas that contain the PBFs, including the absence of buffelgrass, where special management is likely to be effective.

(7) *Comment:* One commenter stated that we should remove PBFs 4 (vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species) and 5 (less than 20 percent cover of buffelgrass) because all occupied areas should be designated as critical habitat. They state that because the species' overall viability requires conservation of all populations and genetic diversity, each remaining plant can contribute to genetic diversity if managed scientifically. Therefore, the commenter writes that no plants should be sacrificed because their habitat is suffering from adverse modification or undergoing outright destruction.

Our response: The Act does not define occupied critical habitat as all areas with the species present. Rather, the Act defines occupied critical habitat as the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those PBFs (I) essential to the conservation of the species and (II) which may require special management considerations or protection (16 U.S.C. 1532(5)(A)(i)). Occupied areas do not need to include all of the PBFs essential to the conservation of the species but must contain at least one. Using the best available scientific information, we have determined the PBFs that are essential to the conservation of prostrate milkweed (for more information, see **Physical or Biological Features Essential to the**

Conservation of the Species, below). These include vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species, and areas that have less than 20 percent cover of buffelgrass. Special management can also help restore the critical habitat areas that are lacking some of the PBFs. Accordingly, we are focusing our conservation efforts for prostrate milkweed in areas that contain at least one PBF where special management is likely to be effective. Special management considerations may include prescribed burning, grazing, and/or brush thinning; nonnative, invasive grass control; protection from activities that disturb the soil; and propagation and reintroduction of plants in restorable areas. Furthermore, plants in areas that are not designated as critical habitat may still contribute to genetic diversity of the species and will receive any protections due to listing, even if those areas are not designated as critical habitat.

I. Final Listing Determination

Background

Please refer to the SSA report and the February 15, 2022, proposed rule (87 FR 8509) for a full summary of species information. Both are available on our Southwest Region website at *https://www.fws.gov/about/region/southwest* and at *https://www.regulations.gov* under Docket No. FWS-R2-ES-2021-0041.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove,

and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an "endangered species" as a species that is in danger of extinction throughout all or a significant portion of its range, and a "threatened species" as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term "threat" to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term

"threat" includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term "threat" may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an "endangered species" or a "threatened species." In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an "endangered species" or a "threatened species" only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term "foreseeable future," which appears in the statutory definition of "threatened species." Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term "foreseeable future" extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be listed as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess prostrate milkweed viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and

reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS-R2-ES-2021-0041 on *https://www.regulations.gov* and at *https://www.fws.gov/office/texas-coastal-ecological-services*.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

For the prostrate milkweed to maintain viability, its populations or some portion thereof must have sufficient resiliency, redundancy, and representation. Several factors influence the resiliency of prostrate milkweed populations, including abundance and recruitment rate, in addition to elements of the species' habitat that determine whether prostrate milkweed populations can grow. These resiliency factors and habitat elements are discussed in detail in the SSA report and summarized here.

Species Needs

Abundance

Prostrate milkweed abundance is difficult to assess due to its ability to remain dormant for multiple years until the necessary environmental conditions occur. Individual plants may emerge only a few times per decade, and not all plants will emerge at the same time (Price 2005, pers. comm.; Best 2017, pers. comm.). Therefore, we considered populations to be extant if plants have been observed within the past 40 years (Strong 2020, pers. comm.) and with available habitat (i.e., not paved over) or with restorable habitat (i.e., nonnative grass could be removed).

Populations of prostrate milkweed must be large enough to have a high probability of enduring random demographic and environmental variation. For example, species or populations may be considered more vulnerable when the probability of persisting 100 years is less than 90 percent (Mace and Lande 1991, p. 151). This metric of population resilience, called minimum viable population (MVP), refers to the smallest population size that has a high probability of surviving over a specified period. Calculations of MVP require data that are not currently available for prostrate milkweed. As a practical alternative, we estimated the likely MVP range of prostrate milkweed by comparing it to species with similar life-history traits for which MVPs have been calculated (Pavlik 1996, p. 137). This method estimates a highly resilient population if prostrate milkweed has 1,600 or more adult individuals (Service 2020, p. 38).

Determinations of MVP usually consider the effective population size, rather than total number of individuals (Pavlik 1996, entire); 10 genetically identical individuals (for example, clones or ramets) would have an effective population size of one. Because prostrate milkweed is likely self-incompatible and does not appear to form clonal colonies, the effective population size is likely to be nearly the same as the total population size.

Recruitment Rate

A stable or increasing population requires recruitment rates that equal or exceed mortality rates (Service 2020, p. 38). All stages of recruitment, from flowering and seed production to germination and establishment, occur when the soil has available moisture. The porous soils of prostrate milkweed habitat dry quickly after a single heavy thunderstorm. Based on observations of other perennial forbs (broad-leaved herbaceous plants) in this ecosystem, recruitment probably occurs during periods of extended rainfall, meaning multiple rain events over a period of several weeks (Service 2020, p. 38). These events are rare in this semiarid region. Consequently, we expect that successful recruitment may occur only once or a few times per decade. Similarly, most mortality probably occurs during years of extended drought. Hence, both recruitment and mortality would have strong pulses and observed population sizes would vary widely from year to year, leading to potentially spurious interpretations of demographic trends (Service 2020, p. 38).

Populations of prostrate milkweed require habitats that also support healthy populations of large native bees and wasps (Service 2020, p. 38). Native bees in turn require a diversity and abundance of native forb and shrub species that provide pollen and nectar. Tarantula hawks (*Pepsis* spp. and *Hemipepsis* spp.) may also be important pollinators of prostrate milkweed; tarantula hawks require healthy populations of their prey species, tarantulas (Best 2020, pers. comm.).

Prostrate milkweed populations require competition from grasses and forbs to be periodically reduced (Service 2020, p. 38). This requirement, which has been observed in other milkweed species, may be an adaptation to wildfire (Baum and Sharber 2012, pp. 968–971). Although mowing or livestock grazing can also reduce competition, it is likely that prostrate milkweed is adapted to grasslands that were sustained by periodic wildfires (Service 2020, p. 39).

Canopy Cover

Canopy cover refers to shade from trees, shrubs, prickly pear cactuses, or tall (taller than 1 meter) grass. Sufficiently resilient prostrate milkweed populations need an open canopy with little or no herbaceous cover (Service 2020, p. 3). Therefore, the species may occur in areas that mimic historical wildfire or grazing, such as along mowed road ROWs (Service 2020, p. 3).

Ground Cover

Ground cover refers to vegetation growing at the herbaceous layer (shorter than 1 meter tall) that would compete with prostrate milkweed plants for resources. Sufficiently resilient prostrate milkweed populations need an open canopy with little or no herbaceous cover, so there is little competition with other plants (Service 2020, p. 3).

Risk Factors for Prostrate Milkweed

We reviewed the potential risk factors (i.e., threats, stressors) that may affect prostrate milkweed now and in the future. In this rule, we will discuss only those factors in detail that could meaningfully impact the status of the species. Those risks that are not known to have effects on prostrate milkweed populations, such as quarrying/mining, hybridization, pollinator decline, and climate change, are not discussed here but are evaluated in the SSA report. The primary risk factors (i.e., threats) affecting the status of prostrate milkweed are: (1) Competition from introduced invasive grasses (Factor A from the Act); (2) habitat loss from root-plowing and conversion of native vegetation to pasture (Factor A); (3) habitat loss from ROW construction and maintenance from energy development and road and utility construction (Factor A); (4) habitat loss from border security development and enforcement activities (Factor A); and (5) the demographic and genetic consequences of small population sizes and population fragmentation (Factor E).

Competition from Nonnative, Invasive Grasses

Nonnative, invasive grass species displace native plants by competing for water, nutrients, and light, and their dense root systems prevent germination of native plant

seeds (Texas Invasives 2019, unpaginated). Buffelgrass (*Pennisetum ciliare*) is a perennial bunchgrass introduced from Africa that is now one of the most abundant introduced grasses in south Texas, and the most prevalent invasive grass within the range of prostrate milkweed. Since the 1950s, Federal and State land management agencies have promoted buffelgrass as a forage grass in south Texas (Smith 2010, p. 113). Buffelgrass is very well-adapted to the hot, semi-arid climate of south Texas due to its drought resistance and ability to aggressively establish in heavily grazed landscapes (Smith 2010, p. 113). Buffelgrass continues to be planted in areas affected by drought and overgrazing to stabilize soils and to increase rangeland productivity. Buffelgrass often creates homogeneous monocultures by out-competing native plants for essential resources (Lyons et al. 2013, p. 8), and it produces phytotoxins in the soil that inhibit the growth of neighboring native plants (Vo 2013, unpaginated). Furthermore, prescribed burning used for brush control promotes buffelgrass forage production in south Texas (Hamilton and Scifres 1982, p. 11).

Most prostrate milkweed plants have been observed where buffelgrass is absent or at low densities (Eason 2019, pers. comm.; Strong 2019, pers. comm.). On national wildlife refuge lands, prostrate milkweed was found in areas where native grass was still dominant, but not where buffelgrass or woody vegetation was present in dense stands (Best 2005, p. 3). The unpaved ROWs on private lands in south Texas for oil and gas wells, wind farms, service roads, pipelines, and powerlines could benefit prostrate milkweed through the periodic mowing of road margins. However, disturbed soils along ROWs are rapidly colonized by buffelgrass.

The Texas Natural Diversity Database (Database) lists invasive species, primarily buffelgrass, as a pervasive threat of extreme severity to prostrate milkweed. The Database defines a pervasive threat as one that affects all or most (71–100 percent) of a species' populations, occurrences, or extent. An extreme level of severity is one that is likely to

destroy or eliminate occurrences or habitat or reduce population sizes by 71–100 percent (TXNDD 2016, unpaginated). It is likely that buffelgrass has negatively impacted all Texas populations (TXNDD 2019–2020, entire; Eason 2019, pers. comm.; Kieschnick 2019, pers. comm.). Competition from buffelgrass is the greatest threat to prostrate milkweed.

Root-Plowing and Conversion of Native Grassland and Savanna

Root-plowing is a brush control method that uses powerful tracked vehicles to excavate the roots of woody plants with heavy steel subsoil rippers that dig several feet into the ground. The dead trees and shrubs are then burned, and the root-plowed soils are planted with buffelgrass for livestock grazing. Root-plowing and conversion to buffelgrass pasture is a widely conducted practice in south Texas and northeast Mexico, occurring in much of the potential habitat of prostrate milkweed. Extensive areas of recently root-plowed lands can be identified in aerial photographs. These practices have been and are still subsidized by the United States Department of Agriculture (USDA) Natural Resources Conservation Service and its precursor, the USDA Soil Conservation Service.

Root-plowing temporarily reduces the encroachment of woody plants into the grassland component of former savannas. The conversion of native habitats to improved pastures dominated by buffelgrass or other introduced grasses greatly reduces the abundance and diversity of most native grass and forb species (Woodin et al. 2010, p. 1). Very few, if any, prostrate milkweed plants survive following root-plowing and buffelgrass planting. This is likely due to the excavation and desiccation of most tubers during root-plowing; subsequently, the few remaining individuals decline due to competition from dense buffelgrass cover.

Conversely, prostrate milkweed occurs in well-managed rangelands, provided that the soil was not previously root-plowed or otherwise disturbed (Service 2020, p. 53).

Most milkweed species are unpalatable to cattle, and often increase in abundance on grazed lands. Livestock, including cattle, sheep, and horses, graze preferentially on grasses and forbs, including buffelgrass, and on nontoxic herbaceous plants; therefore, livestock grazing may reduce competition with prostrate milkweed from these plants (Service 2020, p. 41). In addition to grazing, livestock may also reduce competition with prostrate milkweed by trampling herbaceous plants (Service 2020, p. 41). Because prostrate milkweed is often observed in the wheel ruts of dirt roads, it appears to be unusually tolerant of trampling; thus, the effect of livestock trampling is minimal (Service 2020, pp. 41–42). Periodic livestock grazing reduces competition from native and introduced grasses. In South Texas, over-grazed rangelands typically become invaded by woody plants, reducing the habitat suitability for prostrate milkweed. Hence, management practices that promote sustainable grazing of native grasses are beneficial to prostrate milkweed (Service 2020, p. 41).

Road and ROW Construction and Maintenance

Oil and gas exploration and wind energy development are occurring at a rapid pace in Starr and Zapata Counties, Texas. Seismic exploration and the construction of roads and caliche pads for oil and gas wells and wind turbines can destroy plants and their habitats within the construction footprint (Reemts et al. 2014, pp. 123, 125; Leslie 2016, p. 49). Additionally, graded service roads and other permanent structures may indirectly affect the hydrology of surrounding habitats by diverting and channeling water through drainage culverts. Invasive buffelgrass quickly colonizes disturbed roadsides, then invades adjacent habitats. Heavy vehicle traffic during oil and gas well drilling and wind farm construction may increase the frequency of road maintenance, such as grading or widening (Peña 2019, pers. comm.). Grading or blading a caliche road involves scraping the road's surface with a large heavy blade to remove ruts and roadside vegetation. Increased frequency of road maintenance that removes above-ground portions

of plants could reduce or eliminate prostrate milkweed flower and fruit production. Conversely, grading or blading of caliche roads conducted during the milkweed's dormant periods may benefit the species by temporarily reducing competition from grasses and forbs (TXNDD 2019, p. 11). TXNDD (2019) ranks road expansion as a pervasive threat (affects all or most (71–100 percent) of a species' populations, occurrences, or extent) of extreme severity to prostrate milkweed.

All or parts of nine prostrate milkweed occurrences are in the margins of improved highway ROWs. All highway ROW populations have declined since they were first observed, likely due to the frequency of soil disturbance and invasive grass competition (Service 2020, p. 40). In addition, from 2010 to 2012, Texas Department of Transportation (TxDOT) widened segments of U.S. Highway 83 that affected at least three known prostrate milkweed sites: Arroyo del Tigre Grande, Mission Mier a Visita, and Arroyo Roma (Strong and Williamson 2015, p. 51; Paradise 2019, pers. comm.). TxDOT has also scheduled additional road widening or construction at five known prostrate milkweed populations: Arroyo del Tigre Grande, Arroyo del Tigre Chiquito, Arroyo de los Mudos, Mission Mier a Visita, and Arroyo Roma (TxDOT 2019, unpaginated). U.S. Customs and Border Protection (CBP) has scheduled road improvements at the prostrate milkweed population site located in the Arroyo Morteros tract of the Lower Rio Grande Valley National Wildlife Refuge (NWR) (Vallejo 2019, pers. comm.).

In contrast, all or parts of three prostrate milkweed occurrences are in the margins of unpaved rural roads. These relatively stable populations have persisted in narrow strips of native vegetation between the gravel or caliche roadbeds and the fence lines of adjacent private properties. The soils in these narrow, naturally vegetated strips have never been excavated, and they have relatively little buffelgrass cover.

The installation of natural gas pipelines and fiber-optic cables has removed prostrate milkweed plants in the Dolores and Arroyo del Tigre Chiquito populations in the past (Damude and Poole 1990, p. 32; Boydston 1993, unpaginated; Campos 1993, unpaginated). In 1995, Southwestern Bell installed a fiber-optic cable in the Highway 83 ROW, 2.6 miles south of the Webb-Zapata County line, which removed at least 100 individuals at the Dolores population (Service 1995, p. 1). In 1993, prior to the fiber-optic cable installation, this population was estimated to have 100 to 200 individuals (TXNDD 2019, unpaginated) and was the largest known population of prostrate milkweed.

In summary, prostrate milkweed faces risks from ROWs and road construction and maintenance associated with oil and gas activities, wind energy development, and utility and pipeline corridor construction.

Border Security Development and Enforcement Activities

All known Texas populations of prostrate milkweed are within 9 miles (14.5 kilometers) of the U.S.–Mexico border. To address border security concerns, additional border barrier construction was proposed in the Rio Grande Valley, including the Arroyo Morteros tract of the Lower Rio Grande Valley NWR. Should border wall construction occur, and depending on the alignment, construction could remove prostrate milkweed plants that occur within the construction footprint. Additionally, CBP plans to improve roads across this tract (Vallejo 2019, pers. comm.) and may also install new drag strips along existing roads. Drag strips are 13- to 16-foot (ft) (4- to 5-meter) -wide swaths cleared of all vegetation and regularly scraped to keep the soil surface loose, to detect recent foot traffic. Due to the high gypsum content, soils in this area are extremely vulnerable to gully erosion. Hence, the unvegetated, continually disturbed drag strips may exacerbate soil erosion and impact a much wider area. The Database ranks drag strip construction within prostrate milkweed populations as a small threat (defined as a threat that affects 1–10 percent of the total population or occurrences or extent) with an extreme

level of severity (likely to destroy or eliminate occurrences or habitat, or reduce population by 71–100 percent) (TXNDD 2016, unpaginated). Consequently, the construction of border barriers, roads, and drag strips are potential threats of high magnitude to prostrate milkweed populations, depending on their alignment, design, and proximity to populations and local topography.

Native plant populations are legally protected on NWRs, and, if listed under the Act, these plants have additional legal protections from federally funded or regulated actions. However, a provision of the REAL ID Act of 2005 (Pub. L. 109–13, 119 Stat. 302) gives the Secretary of Homeland Security authority to waive other Federal laws, including the Endangered Species Act, to expedite construction of border barriers. Therefore, border barrier construction on private and public lands is exempt from consultation with the Service under section 7 of the Act. During the previous phase of border barrier construction, beginning in 2007, the Department of Homeland Security (DHS) and the Service coordinated to establish best management practices for the federally listed plants and animals in the project impact area (DHS 2008, entire); nevertheless, these best management practices did not address prostrate milkweed.

Small Population Sizes and Population Fragmentation

Small, isolated populations are more vulnerable to catastrophic losses caused by random fluctuations in recruitment (demographic stochasticity) or variations in rainfall or other environmental factors (environmental stochasticity) (Service 2016, p. 20). Small, reproductively isolated populations are susceptible to the loss of genetic diversity, to genetic drift, and to inbreeding (Barrett and Kohn 1991, pp. 3−30). Due to the small size and isolation of prostrate milkweed populations, several may already suffer from genetic bottlenecks, genetic drift, inbreeding, and loss of allelic diversity.

In addition to population size, it is likely that population density and connectivity also influence population viability (Service 2020, p. 51). Prostrate milkweed is very

likely to be an obligate outcrosser (fertilization between different individuals), as are most other *Asclepias* species, which requires that genetically compatible individuals be clustered within the forage range of the native pollinators for successful reproduction (Service 2020, p. 51). While the specific pollinators of this species have not been revealed, they are likely to be large bees or wasps, and the forage range could be up to several kilometers. If this is the case, sufficiently viable populations of prostrate milkweed could be dispersed at very low densities over relatively large areas, provided that they lie within fairly contiguous habitats that are traversed by pollinating insects. Thus, the small, isolated clusters of prostrate milkweed that have been documented, principally along public roads that slice through large expanses of potential habitat on private lands, may represent only tiny fractions of larger, highly dispersed populations (Service 2020, p. 51).

Based strictly on the available scientific data, the documented populations of prostrate milkweed are all far below the estimated MVP level and may be affected by the demographic and genetic consequences of small population sizes and by fragmentation of populations.

Summary

Our analysis of the past, current, and future influences on the needs of prostrate milkweed for long-term viability revealed several threats that pose a risk to current and future viability: competition from introduced invasive grass (buffelgrass); root-plowing of rangelands; development of new oil and gas wells, wind energy farms, roads, pipelines, and utility corridors; development of new border barriers and drag strips; and the demographic and genetic consequences of small population sizes and population fragmentation. Conversely, well-managed livestock grazing of rangeland is compatible with management of prostrate milkweed habitat and may benefit this species.

Species Condition

The current condition of prostrate milkweed considers the status and risks to its populations. In the SSA report, for each population, we developed and assigned condition categories for two demographic factors and two habitat factors that are important for viability of prostrate milkweed. The condition scores for each factor were then used to estimate the probability of persistence over the next 30 years. We chose 30 years because it is within the range of available climate change model forecasts where we can reasonably foresee the future condition of the species. Populations were rated high, moderate, or low when that probability is greater than 90 percent, between 60 and 90 percent, or between 10 and 60 percent, respectively. Functionally extirpated populations are not expected to persist over 30 years or are already extirpated.

There are 24 populations of prostrate milkweed remaining in Starr and Zapata Counties, Texas, and in Tamaulipas and eastern Nuevo León, Mexico (see table 1, below). The species' range extends more than 200 miles (320 kilometers) from northwest to southeast. In Texas, one population, Dolores, is somewhat isolated in northern Zapata County, with the nearest known population approximately 25 miles (40 kilometers) away. In Mexico, eight known populations are in isolated pockets widely scattered in Tamaulipas and eastern Nuevo León. However, botanists have only surveyed a small proportion of the species' range. Furthermore, the species remains dormant and undetectable except for short periods of time after infrequent, heavy rainfall. Consequently, although the species is certainly rare, its actual abundance is difficult to determine. It is likely that, historically, populations occurred between these areas, connecting the populations in Texas and Mexico. Because they are widely separated, natural gene flow or reestablishment following disturbance is very unlikely between the 24 known populations. Based upon our analysis of current conditions of these 24 extant populations, none are in high condition, 5 are in moderate condition, and 19 are in low condition.

Table 1. Summary of current condition for prostrate milkweed.

Population Name	Current Condition
Dolores	Low
14493	Low
14491	Low
Arroyo del Tigre Grande	Moderate
Arroyo del Tigre Chiquito	Low
FM 2098	Low
Falcon	Low
Los Alvaros	Moderate
Arroyo Morteros Tract	Moderate
Los Arrieros Loop	Low
Arroyo de los Mudos	Low
Mission Mier a Visita	Low
San Julián Road	Moderate
FM 3167	Moderate
Arroyo Roma	Low
Arroyo Ramirez Tract	Low
Rancho La Coma	Low
Road to Guerrero Viejo	Low
Carboneras	Low
Punta de Alambre	Low
Intersection of 101–180	Low
Rio El Catán	Low
Rancho Loreto North	Low
Rancho Loreto South	Low

The two demographic factors used to analyze resiliency of prostrate milkweed populations are abundance and recruitment rate. Related to abundance, a highly resilient population of prostrate milkweed has 1,600 or more adult individuals, a moderately resilient population has from 800 to 1,600 mature individuals, and a population with fewer than 800 mature individuals has low resilience (Service 2020, p. 38). Prostrate milkweed populations have high resiliency if the recruitment rate is greater than or equal to 25 percent of individuals producing viable seeds per year. Moderately resilient populations have recruitment rates of between 15 and 24 percent per year, and populations with low resiliency have recruitment rates of less than 15 percent per year (Service 2020, p. 57).

The two habitat factors used to analyze resiliency of prostrate milkweed populations were canopy cover and groundcover. Highly resilient populations have less than 30 percent canopy cover and have all bare ground or are sparsely vegetated with mostly native grass and/or forbs. Moderately resilient populations have between 30 and 60 percent canopy cover and are sparsely vegetated with a mixture of native and nonnative grasses and/or forbs. Minimally resilient populations have between 61 and 100 percent canopy cover and a dense groundcover of native or introduced grasses and forbs and little or no bare ground (Service 2020, p. 57).

Redundancy is low for this species due to low numbers of populations in moderate to high condition for resiliency, making prostrate milkweed populations vulnerable to extirpations from catastrophic events. Because buffelgrass invasion is prevalent in this area, ecological diversity among the known populations is limited and thus species representation is low. Furthermore, the populations are isolated and widespread across the range, and therefore gene flow among the populations is limited. As a consequence of these current conditions, the viability of the prostrate milkweed now primarily depends on maintaining and restoring the remaining isolated populations and potentially discovering or reintroducing new populations where feasible.

As part of the SSA, we also developed three plausible future scenarios to capture the range of uncertainties regarding future threats and the projected responses by the prostrate milkweed. Our scenarios included a continuing conditions scenario, which incorporated the current risk factors continuing on the same trajectory that they are on now. We also evaluated a conservation scenario and a scenario with increased stressors. Because we determined that the current condition of the prostrate milkweed is consistent with an endangered species (see **Determination of Prostrate Milkweed's Status**, below), we are not presenting the results of the future scenarios in this rule. Please refer to the SSA report (Service 2020, entire) for the full analysis of future scenarios.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Determination of Prostrate Milkweed's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an "endangered species" as a species in danger of extinction throughout all or a significant portion of its range, and a "threatened species" as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we found that, of the 24 known prostrate milkweed populations remaining, 19 are small, are isolated, and have low resiliency; 5 have moderate resiliency and connection to other populations; and none have high resiliency. Several factors pose threats to prostrate milkweed, including competition from introduced, invasive grass; habitat loss and degradations from root-plowing and conversion of native vegetation to improved buffelgrass pasture; habitat loss from ROW construction and maintenance from energy development and road and utility construction; habitat loss from border security development and enforcement activities (Factor A from the Act); and the demographic and genetic consequences of small population sizes (Factor E).

All the aforementioned threats are currently affecting the known populations of prostrate milkweed. Buffelgrass has already negatively impacted all the Texas populations (TXNDD 2019–2020, entire; Eason 2019, pers. comm.; Kieschnick 2019, pers. comm.) and will continue to do so in the future. Habitat loss and degradation from root-plowing and conversion of native vegetation to improved buffelgrass pasture has also already been occurring for many years (Service 2020, p. 40). Habitat loss from ROW construction and maintenance associated with energy development and road and utility construction has already been observed from oil and gas development occurring in Zapata County. As of November 2019, no wind turbines, oil or gas well pads, pipelines, or energy service roads have been constructed directly within known prostrate milkweed populations. However, some Starr County prostrate milkweed populations are less than 2 kilometers (1.2 miles) from existing wind turbines (Service 2020, pp. 42–43), and a few wind energy farms are expected to be constructed in the future, which could lead to additional habitat loss. Habitat loss from border security development and enforcement activities has occurred in recent years and is expected to continue. Finally, the

demographic and genetic consequences of small population sizes are a current threat to the prostrate milkweed. This situation is not expected to change into the future.

In addition to the current threats, redundancy and representation are also limited. There are 24 known populations that are distributed widely across the species' range, and the majority of those populations are currently in low condition. Should a catastrophic event occur, the populations are vulnerable to extirpation because they are small and isolated from each other. The small, reproductively isolated populations are also susceptible to the loss of genetic diversity, genetic drift, and inbreeding due to random fluctuations in recruitment (demographic stochasticity) or variations in rainfall or other environmental factors (environmental stochasticity). Because of the species' overall current resiliency, redundancy, and representation, prostrate milkweed is currently in danger of extinction throughout all of its range. We do not find that the species meets the Act's definition of a threatened species because the species has already shown low levels in current resiliency, redundancy, and representation due to the threats mentioned above. Thus, after assessing the best available information, we determine that prostrate milkweed is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the prostrate milkweed is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portions of its range. Because the prostrate milkweed warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of

"Endangered Species" and "Threatened Species" (Final Policy) (79 FR 37578, July 1, 2014) providing that if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the prostrate milkweed meets the Act's definition of an endangered species. Therefore, we are listing prostrate milkweed as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened ("downlisting") or removal from protected status ("delisting"), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*https://www.fws.gov/program/endangered-species*), or from our Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for

non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Texas will be eligible for Federal funds to implement management actions that promote the protection or recovery of the prostrate milkweed. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance*.

Please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us.

Federal agency actions within the species' habitat that may require conference, consultation, or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Fish and Wildlife Service.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered plants. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.61, make it illegal for any person subject to the jurisdiction of the United States to import or export; remove and reduce to possession from areas under

Federal jurisdiction; maliciously damage or destroy on any such area; remove, cut, dig up, or damage or destroy on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law; deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce an endangered plant. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62. With regard to endangered plants, a permit may be issued for scientific purposes or for enhancing the propagation or survival of the species. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the *Federal Register* on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of the listed species. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Normal agricultural and silvicultural practices, including herbicide and pesticide use, that are carried out in accordance with any existing regulations, permit and label requirements, and best management practices;

(2) Normal residential landscaping activities on non-Federal lands; and

(3) Recreational use with minimal ground disturbance.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Unauthorized handling, removing, trampling, or collecting of prostrate milkweed on Federal land; and

(2) Removing, cutting, digging up, or damaging or destroying prostrate milkweed in knowing violation of any law or regulation of the State of Texas or in the course of any violation of a State criminal trespass law.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Although this critical habitat designation was proposed when the regulatory definition of habitat (85 FR 81411; December 16, 2020) and the 4(b)(2) exclusion regulations (85 FR 82376; December 18, 2020) were in place and in effect, those two regulations have been rescinded (87 FR 37757; June 24, 2022 and 87 FR 43433; July 21, 2022) and no longer apply to any designations of critical habitat. Therefore, for this final rule designating critical habitat for the prostrate milkweed, we apply the regulations at 424.19 and the 2016 Joint Policy on 4(b)(2) exclusions (81 FR 7226; February 11, 2016).

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate a species' critical habitat concurrently with listing the species. None of the situations identified at 50 CFR 424.12(a) for when designation of

critical habitat would be not prudent or not determinable is present. We therefore are designating critical habitat for prostrate milkweed concurrently with listing it.

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical and biological features (PBFs)

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain PBFs (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those PBFs that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the *Federal Register* on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded

by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the PBFs that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define "physical or biological features essential to the conservation of the species" as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover

for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Geological Substrate and Soils

Prostrate milkweed grows in well-drained sandy soils of the Tamaulipan shrubland region of south Texas and northeast Mexico (Service 2020, pp. 22–26). In Starr and Zapata Counties, Texas, the soils of documented sites overlie Eocene and Oligocene sandstones and clays of the Laredo, Yegua, and Jackson geological formations (Stoeser et al. 2005, unpaginated). In some occupied sites, a stratum of indurated caliche may also be present; in south Texas, caliche refers to soil strata of precipitated calcium carbonate formed during the early Pliocene (Spearing 1998, pp. 258, 398; Baskin and Hulbert, Jr. 2008, p. 93). Soil types of these occupied sites include deep eolian Hebbronville sands, Copita fine sandy loam, Brennan fine sandy loam, eroded Maverick

soils, Catarina clay, and Zapata soils (USDA 1972, entire; USDA 2011, entire). Elevated levels of gypsum are present at some sites.

The climate of the Tamaulipan shrubland region is subtropical and semi-arid. Much of the region's precipitation occurs during infrequent periods of heavy rainfall that interrupt prolonged spells of very hot, dry weather. Rainfall readily infiltrates into the well-drained sandy soils of prostrate milkweed habitats, but moisture does not persist long in these soils. Many occupied sites have underlying strata of sandstone; these barriers to root growth limit the establishment of trees and taller shrubs. The growth of many plant species is also limited by high soil gypsum concentrations in some occupied sites. The rapid drying of soil, impenetrable rock strata, and high gypsum are all factors that reduce competition from woody plants, grasses, and other herbaceous plants.

Prostrate milkweed forms tubers underground that are able to persist in a dormant condition for one to several years. The species responds very quickly to rainfall; the tubers sprout new stems that emerge, flower, and set seed in a matter of weeks, and the plants store carbohydrates, minerals, and water in tubers. Then the above-ground portions die back during hot, dry weather. Prostrate milkweed does not occur in areas of higher rainfall or where moisture persists longer in deeper silty or clayey soils. The species does not persist when occupied sites develop a dense shrub overstory or dense cover of grasses. We conclude that prostrate milkweed is endemic to sites where it escapes competition from other plants through its unique adaptation to ephemeral soil moisture, prolonged drought, and tolerance of high gypsum concentrations.

Therefore, well-drained sandy soil overlying sandstone or indurated caliche strata is an essential physical feature of prostrate milkweed critical habitats. A high soil gypsum concentration contributes to the habitat suitability of some sites by reducing competition and is an essential physical feature.

Ecological Community

Within the Tamaulipan shrubland ecological region, prostrate milkweed inhabits arid subtropical grasslands and shrub savannas. It requires an open canopy, where there is little or no shade from trees and shrubs, and relatively little competition from grasses and herbaceous plants; the estimated combined cover of woody plants, grasses, and herbaceous plants at a site in Zapata County was less than 30 percent (Damude and Poole 1990, p. 16). It is likely that naturally occurring wildfires, in the past, maintained the relatively open structure of these plant communities (Scifres and Hamilton 1993, pp. 8–21). We have observed an increased abundance of other Texas species of *Asclepias*, including antelope horns (*A. asperula*), Emory's milkweed (*A. emoryi*), zizotes milkweed (*A. oenotheroides*), and wand milkweed (*A. viridiflora*), during the first few years after sites have burned; this fire-following effect has been described for green milkweed (*A. viridis*) (Baum and Sharber 2012, entire). Prostrate milkweed, like other milkweeds, may also be stimulated to grow and flower after wildfires have reduced competition.

Most *Asclepias* species require outcrossing for effective fertilization of flowers. All *Asclepias* species have highly specialized pollination mechanisms that require animal pollinators to carry pollen from one individual to another. Although the effective pollinators of prostrate milkweed have not been determined, these are likely to include large bees and wasps. For example, the closely related zizotes milkweed is effectively pollinated by very large wasps called tarantula hawks (*Pepsis* spp. and *Hemipepsis* spp.) (Service 2020, pp. 17, 35–36). Therefore, prostrate milkweed habitats must also support populations of large bees and wasps that, in turn, require abundant, diverse sources of pollen and nectar. Much like milkweeds, many pollen and nectar plants are fire followers that are most abundant in sites that burn periodically, but decline when fires are infrequent.

Buffelgrass is an African grass that is widely planted in south Texas for livestock forage. Buffelgrass is highly invasive, and frequently displaces native grasses and

herbaceous plants (Best 2009, pp. 310–311), including prostrate milkweed (Service 2020, pp. 39–40) and the pollen and nectar plants needed to support pollinator populations. The majority of prostrate milkweed plants have been observed in sites where buffelgrass is absent or at low densities (Eason 2019, pers. comm.; Strong 2019, pers. comm.). Prostrate milkweed requires an open canopy with less than 30 percent cover of native and nonnative grasses and herbaceous plants combined (Damude and Poole 1990, p. 16); thus, assuming nonnative buffelgrass is more prevalent, we estimate that 20 percent or less cover of buffelgrass is at a low enough density for prostrate milkweed to survive. Therefore, prostrate milkweed habitats must also have less than 20 percent cover of buffelgrass for prostrate milkweed to have access to sufficient resources such as sunlight.

In summary, the essential biological features of prostrate milkweed critical habitats are: (1) open savannas and grasslands of the Tamaulipan shrubland ecological region; (2) vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species; and (3) less than 20 percent cover of buffelgrass.

Summary of Essential Physical or Biological Features

Additional information can be found in the SSA report (Service 2020, available on *https://www.regulations.gov* under Docket No. FWS-R2-ES-2021-0041). We have determined that the following PBFs are essential to the conservation of prostrate milkweed:

(1) Well-drained sandy soil overlying strata of sandstone or indurated caliche;

(2) High soil gypsum concentration;

(3) Open savannas and grasslands of the Tamaulipan shrubland ecological region;

(4) Vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species; and

(5) Less than 20 percent cover of buffelgrass.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: nonnative, invasive grass; root-plowing and conversion of native vegetation to buffelgrass pasture; ROW construction and maintenance from energy development and road and utility construction; border security development and law enforcement activities; and small population sizes. Management activities that could ameliorate these threats include, but are not limited to: prescribed burning, grazing, and/or brush thinning; nonnative, invasive grass control; protection from activities that disturb the soil; and propagation and reintroduction of plants in restorable areas. There are a variety of ways to manage the land to address the threats facing prostrate milkweed.

In summary, we find that the occupied areas we are designating as critical habitat contain the PBFs that are essential to the conservation of the species and that may require special management considerations or protection. Special management considerations or protection may be required of the Federal action agency to eliminate, or to reduce to negligible levels, the threats affecting the PBFs of each unit.

Criteria Used to Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical

habitat. We are not designating any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. While prostrate milkweed needs additional populations to reduce the likelihood of extinction in the future, we are not able to identify additional locations that may have a reasonable certainty of contributing to conservation at this time due to limited access to privately owned lands and information regarding lands that would be good candidates for introductions in the species' range. Accordingly, we cannot at this time identify unoccupied locations that are essential to the conservation of the species.

We are designating lands as critical habitat that we have determined are occupied at the time of listing (i.e., currently occupied) and that contain one or more of the PBFs that are essential to support life-history processes of the species. Units are based on one or more of the PBFs being present to support prostrate milkweed's life-history processes. Some units contain all of the identified PBFs and support multiple life-history processes. Some units contain only some of the PBFs necessary to support the prostrate milkweed's particular use of that habitat.

In summary, for areas within the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria. First, using ArcGIS software, we identified potential habitats in Starr and Zapata Counties that have the essential features of geology and soils described above. The geographic information we obtained about the known populations exists as: (1) vegetation surveys of entire tracts of land; (2) element occurrence (EO) polygons represented in the Texas Natural Diversity Database (Database); or (3) points and lines represented in the Database. We then adapted methods to delineate critical habitats for each type of geographic information.

We delineated all the potential habitats that occur at the Arroyo Ramirez tract and the Arroyo Morteros tract of the Lower Rio Grande Valley NWR as critical habitat (Units

2 and 5). The Lower Rio Grande Valley NWR comprises several disconnected land parcels, rather than one big land area, and these parcels are referred to as "tracts." The two tracts that are included in Units 2 and 5 are isolated areas of NWR land. These NWR tracts are managed for the conservation of native plants and animals, and we have conducted plant surveys and have extensive knowledge of habitat suitability of these tracts.

Similarly, we delineated all the potential habitats that occur at a private ranch (Unit 6) that is managed for wildlife and plant conservation as critical habitat. The landowner has granted access for plant surveys and vegetation studies to researchers from the Texas Parks and Wildlife Department, academic institutions, and the Service. Two of the known populations are represented as polygons in the Database located in the ROWs of unpaved county roads in Starr County. We have no information about the land uses or habitat suitability of areas outside these polygons. We delineated all the potential habitats that occur within these polygons (Units 4 and 7) as critical habitat. Three of the known populations are represented as one or more points or lines in the Database located on privately owned land. We have no information about the land uses or habitat suitability of areas outside the points and lines. Because critical habitats must be areas, not points or lines, we delineated all areas of potential habitat within 50 meters (m) (164 feet (ft)) from these points and lines as critical habitat units; we chose the 50-m distance because the Database also used a 50-m distance for most of these features to account for estimated geographic precision. To complete the delineations of critical habitat areas, we overlaid each critical habitat area described above on Digital Ortho-Quarter Quad aerial photographs to identify and exclude any portions of sites that consist of unvegetated roadbeds that are frequently driven and are maintained by road grading, as well as structures and other developed areas that do not contain the geological and soil substrates and vegetative cover that are essential PBFs.

We did not include in this designation one historical observation that has only approximate location data and cannot be mapped. We also did not include any of the populations reported in the U.S. Highway 83 ROW, all of which have declined since they were first reported. For example, part of EO 3 (Dolores) along U.S. Highway 83 had about 200 individuals in 1988; four surveys conducted from 2009 to 2017 found from 0 to 3 individuals. The degree and frequency of soil disturbance in the ROWs of improved highways has caused almost complete replacement of the native plant community with introduced species, such as buffelgrass. Hence, the essential PBFs are no longer present along this improved highway ROW. For the same reasons, we did not include one site in the road bed of a Starr County park where the species was last observed in 1995.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for prostrate milkweed. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PBFs in the adjacent critical habitat.

This final critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under **Regulation Promulgation**. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on

https://www.regulations.gov at Docket No. FWS-R2-ES-2021-0041 and on our internet site at *https://www.fws.gov/office/texas-coastal-ecological-services*.

Final Critical Habitat Designation

We are designating eight units as critical habitat for prostrate milkweed. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for prostrate milkweed. The eight areas we are designating as critical habitat units are all Database EOs: Unit 1 (EO 3), Unit 2 (EO 10), Unit 3 (EO 11), Unit 4 (EO 12), Unit 5 (EO 15), Unit 6 (EO 16), Unit 7 (EO 17), and Unit 8 (EO 22). Table 2 shows the critical habitat units and the approximate area of each unit. All units are occupied.

Table 2. Critical habitat units for prostrate milkweed. [Area estimates reflect all land within critical habitat unit boundaries.]

Critical Habitat Unit	Land Ownership by Type	Size of Unit in Acres (Hectares)	Occupied?
1 (EO 3)	County Road ROW and Private	10.5 (4.3)	Yes
2 (EO 10)	Federal (Service)	85.7 (34.7)	Yes
3 (EO 11)	Private	4.0 (1.6)	Yes
4 (EO 12)	County Road ROW	4.2 (1.7)	Yes
5 (EO 15)	Federal (Service)	51.9 (21.0)	Yes
6 (EO 16)	County Road ROW and Private	484.3 (196.0)	Yes
7 (EO 17)	County Road ROW and Private	19.4 (7.8)	Yes
8 (EO 22)	Private	1.0 (0.4)	Yes
Total		661.0 (267.5)	

Note: Area sizes may not sum due to rounding.

Below, we present brief descriptions of all units and reasons why they meet the definition of critical habitat for prostrate milkweed.

Unit 1: EO 3

Unit 1 consists of six areas, totaling 10.5 acres (ac) (4.3 hectares (ha)), east of U.S. Highway 83 in northwest Zapata County. This unit is on private land and unpaved county road ROWs. The unit is occupied by the species and contains PBFs 1, 3, and 4.

Although we have no recent information on threats that affect this unit, we conclude that this unit is affected by invasive, nonnative grass (buffelgrass) and road maintenance operations. Therefore, special management considerations may be required to reduce invasion of nonnative species and impacts from ROW maintenance.

Unit 2: EO 10

Unit 2 consists of 85.7 ac (34.7 ha) in the 699.4-acre Arroyo Ramirez tract of Lower Rio Grande Valley NWR. This unit is in southwestern Starr County adjacent to the Rio Grande on the U.S.–Mexico border. The entire unit is on land owned and managed by the Service. The unit is occupied by the species and contains PBFs 1 and 4.

In this final rule, the designated critical habitat in Unit 2 reflects recently constructed border wall, which reduces the area meeting the definition of critical habitat in the unit. Specifically, this change results in a decrease of 19.7 ac (8.0 ha) of critical habitat from what we proposed for Unit 2 on February 15, 2022 (87 FR 8509).

This unit could be directly impacted by border security operations (i.e., drag strips), or indirectly impacted by channeling of runoff along the barrier during heavy rainfall, in addition to invasion of buffelgrass. Therefore, special management considerations may be required to mitigate impacts from border security operations and nonnative grass.

Unit 3: EO 11

Unit 3 consists of three areas, totaling 4.0 ac (1.6 ha), on private land in southwestern Starr County. The unit is occupied by the species and contains PBFs 1, 2, and 4. We have no recent information on threats that affect this unit. Special management considerations may be required.

Unit 4: EO 12

Unit 4 consists of 4.2 ac (1.7 ha) along an unpaved county road ROW in southwestern Starr County. This ROW supports a narrow strip of diverse native

vegetation that has likely not been plowed, bulldozed, or graded. The unit is occupied by the species and contains all of the PBFs essential to the conservation of prostrate milkweed. This unit is affected by invasive, nonnative grass (buffelgrass) and maintenance and operation of the county road. Therefore, special management considerations may be required to reduce invasion of nonnative species.

Unit 5: EO 15

Unit 5 consists of 51.9 ac (21.0 ha) in the 90.8-acre Arroyo Morteros tract of the Lower Rio Grande Valley NWR. This unit is in southwestern Starr County adjacent to the Rio Grande on the U.S.–Mexico border. The entire unit is on land owned and managed by the Service. The unit is occupied by the species and contains all of the PBFs essential to the conservation of prostrate milkweed.

In this final rule, the designated critical habitat in Unit 5 reflects correction of a map projection error of the NWR tract boundary, which reduces the area of this unit. Specifically, this change results in a decrease of 10.6 ac (4.3 ha) of critical habitat from what we proposed for Unit 5 on February 15, 2022 (87 FR 8509).

This unit could be directly impacted by border barrier construction and security operations (i.e., drag strips), or indirectly impacted by channeling of runoff along the barrier during heavy rainfall, in addition to invasion of buffelgrass. Therefore, special management considerations may be required to mitigate impacts from border security operations and nonnative grass.

Unit 6: EO 16

Unit 6 consists of 484.3 ac (196.0 ha) entirely on the 488.5-acre private Martinez Ranch and along a county road ROW. This unit is in southern Starr County. The owner of the Martinez Ranch is a willing conservation partner in managing the property's native plants and wildlife. The unit is occupied by the species and contains all of the PBFs essential to the conservation of prostrate milkweed. This unit is affected by invasive,

nonnative grass (buffelgrass). Therefore, special management considerations may be required to reduce invasion of nonnative species.

Unit 7: EO 17

Unit 7 consists of 19.4 ac (7.8 ha) along both sides of an unpaved county road ROW and adjacent private land in western Starr County. This ROW supports a narrow strip of diverse native vegetation that has likely not been plowed, bulldozed, or graded. The unit is occupied by the species and contains PBFs 1, 3, 4, and 5. This unit is affected by invasive, nonnative grass (buffelgrass) and maintenance and operation of the county road. Therefore, special management considerations may be required to reduce invasion of nonnative species.

Unit 8: EO 22

Unit 8 consists of 1.0 ac (0.4 ha) on private land in central Zapata County. The unit is occupied by the species and contains PBFs 1, 3, and 4. Although we have no recent information about threats that affect this unit, we estimate that this unit is affected by invasive, nonnative grass (buffelgrass) and development and maintenance of oil and gas wells and utility corridors. Therefore, special management considerations may be required to reduce invasion of nonnative species and impacts from ROW construction and maintenance from energy development and road and utility construction.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification

means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 et seq.) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but Congress also enacted some exceptions in 2018 to the requirement to reinitiate consultation on certain land management plans on the basis of a new species listing or new designation of critical habitat that may be affected by the

subject Federal action. See 2018 Consolidated Appropriations Act, Pub. L. 115-141, Div, O, 132 Stat. 1059 (2018).

Application of the "Adverse Modification" Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support PBFs essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would degrade or destroy native plant communities. Such activities could include, but are not limited to, building roads, clearing land for oil and gas exploration or other purposes, introducing and encouraging the spread of nonnative species (i.e., buffelgrass), and conducting border security operations. However, above-ground cutting or thinning of woody plants and prescribed burning are recommended management practices for conservation of prostrate milkweed and other native grasses and forbs, and would not destroy or adversely modify critical habitats.

(2) Actions that would mechanically disturb the soil structure. Such activities could include, but are not limited to, bulldozing, root-plowing, ripping, excavating, or

other mechanical operations that penetrate deep enough into the soil to cut or remove the tubers of prostrate milkweed.

(3) Actions that would increase competition from woody plants or introduced grasses. Such activities could include, but are not limited to, intentional planting of introduced grass species, such as buffelgrass, bermudagrass (*Cynodon dactylon*), or Old World bluestems (introduced species of *Dichanthium* and *Bothriochloa*).

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no DoD lands with a completed INRMP within the final critical habitat designation.

Consideration of Impacts under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 FR 7226 (February 11, 2016)) (2016 Policy), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a

2008 Department of the Interior Solicitor's opinion entitled, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (M-37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable.

The Secretary may exclude any particular area if she determines that the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In this final rule, we are not excluding any areas from critical habitat. We describe below the process that we undertook for deciding whether to exclude any areas taking into consideration each category of impacts and our analyses of the relevant impacts.

Exclusions Based on Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our economic analysis of the critical habitat designation and related factors (IEc 2021, entire). The analysis, dated March 11, 2021, was made available for public review from February 15, 2022, through April 18, 2022 (87 FR 8509). The economic analysis addressed probable economic impacts of critical habitat designation for prostrate milkweed. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat

designation. This final critical habitat designation is 30.3 ac (12.3 ha) less than the proposed critical habitat designation, and therefore we would expect the incremental costs to be the same or slightly less than previously estimated in the economic analysis. Additional information relevant to the probable incremental economic impacts of the critical habitat designation for prostrate milkweed is summarized below and available in the screening analysis for the prostrate milkweed (IEc 2021, entire), available at *https://www.regulations.gov*.

The full description of the findings from the economic analysis are outlined in the proposed rule (87 FR 8509; February 15, 2022). The estimated incremental costs of the total proposed critical habitat designation for prostrate milkweed was found to be less than $37,800 per year. Therefore, with the removal of 30.3 ac (12.3 ha) of critical habitat from this final critical habitat designation to reflect border wall construction in Unit 2 and the correction of the map projection for Unit 5, the annual administrative burden is very unlikely to reach $100 million, which is the threshold for a significant regulatory action under Executive Order (E.O.) 12866.

As discussed above, we considered the economic impacts of the critical habitat designation, and the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the prostrate milkweed based on economic impacts.

Exclusions Based on Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by

section 4(a)(3)(B)(i), because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. We did not receive any additional information during the public comment period for the proposed critical habitat designation from DoD, DHS, or any other Federal agency regarding impacts of the designation on national security or homeland security that would support excluding any specific areas from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. No lands within the designation of critical habitat for prostrate milkweed are owned or managed by DoD or DHS.

We received a comment from the Office of the Attorney General of Texas regarding its concerns that including portions of the Texas border as critical habitat would impact national security by preventing Texas's efforts to address the border crisis. We coordinated with CBP in finalizing this rule to ensure appropriate collaboration in our national security and conservation efforts, and they did not request exclusion of the two units of critical habitat located along the border on the basis of national security or homeland security concerns. As a result, we do not anticipate that there will be an impact on national security or homeland security. Accordingly, we evaluated the Office of the Attorney General of Texas's request for under the basis of other relevant impacts (see *Exclusions Based on Other Relevant Impacts*) below.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the

species in the area—such as HCPs, SHAs, or CCAAs—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

Attorney General of Texas—Texas Border Lands

We received a comment from the Attorney General of Texas requesting that areas along the U.S.–Mexico border in Texas be excluded from the final critical habitat designation for prostrate milkweed. This request involves Units 2 and 5, which are lands owned and managed by the Service as part of the Lower Rio Grande Valley NWR.

The Attorney General of Texas' rationale for requesting the exclusion was that designating these lands along the U.S.–Mexico border in Texas would prevent Texas' effort to address the border crisis via implementing proven deterrence measures to protect its borders from illegal immigration, such as building a border barrier and engaging in border enforcement activities. In his comment, the Attorney General of Texas acknowledged the value in protecting species native to Texas and general conservation efforts, but stated that designating critical habitat must also account for potential implications to border security, and thus national security. The Attorney General of Texas discussed the increasing trend in the number of encounters with migrants at the border and organized crime, such as human and drug trafficking, and discussed the economic impact to ranchers from fence and gate damage.

Additionally, the Attorney General of Texas commented that recent environmental analyses conducted by CBP determined that border enforcement activities, such as border barrier and road construction, are of minimal or no significance to prostrate milkweed, and thus designation of critical habitat is not needed to protect the

species. The Attorney General of Texas writes that these actions by Texas to secure the border would reduce foot traffic by enforcing border security activities, thus actually benefiting surrounding vegetation, including prostrate milkweed. The comment concludes that the border crisis in Texas is resulting in increased costs to the State of Texas. The Attorney General of Texas concludes that designating critical habitat along the U.S.–Mexico border in Texas would prevent the State from implementing proven deterrence measures to protect its border.

Prostrate milkweed occurs in two areas along the U.S.–Mexico border on tracts of land owned by the Lower Rio Grande Valley NWR: Arroyo Ramirez and Arroyo Morteros, Units 2 and 5 of critical habitat, respectively. An 11,086-foot-long border wall was constructed across the western and northern part of the Arroyo Ramirez tract, and the cleared construction area averages about 200 feet wide and is 46.7 acres in area. The Arroyo Morteros tract does not currently have a border wall, but there was a road proposed for border security purposes that has not been constructed, despite the fact that the construction was waived from environmental review.

As stated above, the lands in these two units are owned and managed by the Service. The Lower Rio Grande Valley NWR has many tracts of refuge land along the border. Service staff regularly collaborate with CBP to ensure that border security operations can occur without any impediments. The Real ID Act of 2005 granted authority to the DHS to override other Federal laws, including the Endangered Species Act, for the purpose of border security operations and infrastructure. Therefore, designating critical habitat along the border would not impact CBP's ability to engage in border security operations in these areas. Specifically, the listing and designation of critical habitat for prostrate milkweed will not preclude border wall construction or security operations. It is also unlikely that there will be future restrictions on CBP's border enforcement activities resulting from the ongoing requirements from designating

critical habitat. We will continue to collaborate with DHS and CBP to ensure border security operations can still occur in areas designated as critical habitat for prostrate milkweed. The requirement to provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat on the basis of national-security or homeland-security impacts applies to Federal agencies, including DoD and DHS. We contacted CBP in developing this final critical habitat designation but did not receive a response. If such information is provided in the future, we will conduct a discretionary analysis.

Further, our 2016 Policy (81 FR 7226; February 11, 2016) states that the Secretary may undertake a preliminary evaluation of any plans, partnerships, economic considerations, national-security considerations, or other relevant impacts identified after considering the impacts required by the first sentence of the Act's section 4(b)(2). Following the preliminary evaluation, the Secretary may choose to enter into the discretionary 4(b)(2) exclusion analysis for any particular area (81 FR 7226; February 11, 2016). Here, we conducted a preliminary evaluation based on the comments we received from Texas, but, as set forth above, we have not determined that a full discretionary 4(b)(2) analysis is warranted at this time. Accordingly, we are not excluding the area from this final rule due to national security or any other basis.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for

achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 et seq.), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5

million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and following recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, we certify that this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the comment period on the February 15, 2022, proposed rule (87 FR 8509) that may pertain to our consideration of the probable incremental

economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that this critical habitat designation will significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following finding:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide

funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for prostrate milkweed in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. Our takings implications assessment concludes that this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and

the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the PBFs of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this rule identifies the PBFs essential to the conservation of the species. The areas of designated critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no

Tribal lands fall within the boundaries of the critical habitat designation for the prostrate milkweed, so no Tribal lands will be affected by the designation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rule are the staff members of the U.S. Fish and Wildlife Service's Species Assessment Team and the Austin and Texas Coastal Ecological Services Field Offices.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. In § 17.12, amend paragraph (h) by adding an entry for "*Asclepias prostrata*" to the List of Endangered and Threatened Plants in alphabetical order under FLOWERING PLANTS to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS				
* * * * * * *				
Asclepias prostrata	Prostrate milkweed	Wherever found	E	87 FR [Insert *Federal Register* page where the document begins], [Insert date of publication in the *Federal Register*]; 50 CFR 17.96(a).[CH]
* * * * * * *				

3. In § 17.96, amend paragraph (a) by adding an entry for "Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed)" after the entry for "Family Apiaceae: *Lomatium cookii* (Cook's lomatium, Cook's desert parsley)", to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed)

(1) Critical habitat units are depicted for Starr and Zapata Counties, Texas, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of *Asclepias prostrata* consist of the following components:

(i) Well-drained sandy soil overlying strata of sandstone or indurated caliche;

(ii) High soil gypsum concentration;

(iii) Open savannas and grasslands of the Tamaulipan shrubland ecological region;

(iv) Vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species; and

(v) Less than 20 percent cover of *Pennisetum ciliare* (buffelgrass).

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located

existing within the legal boundaries on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

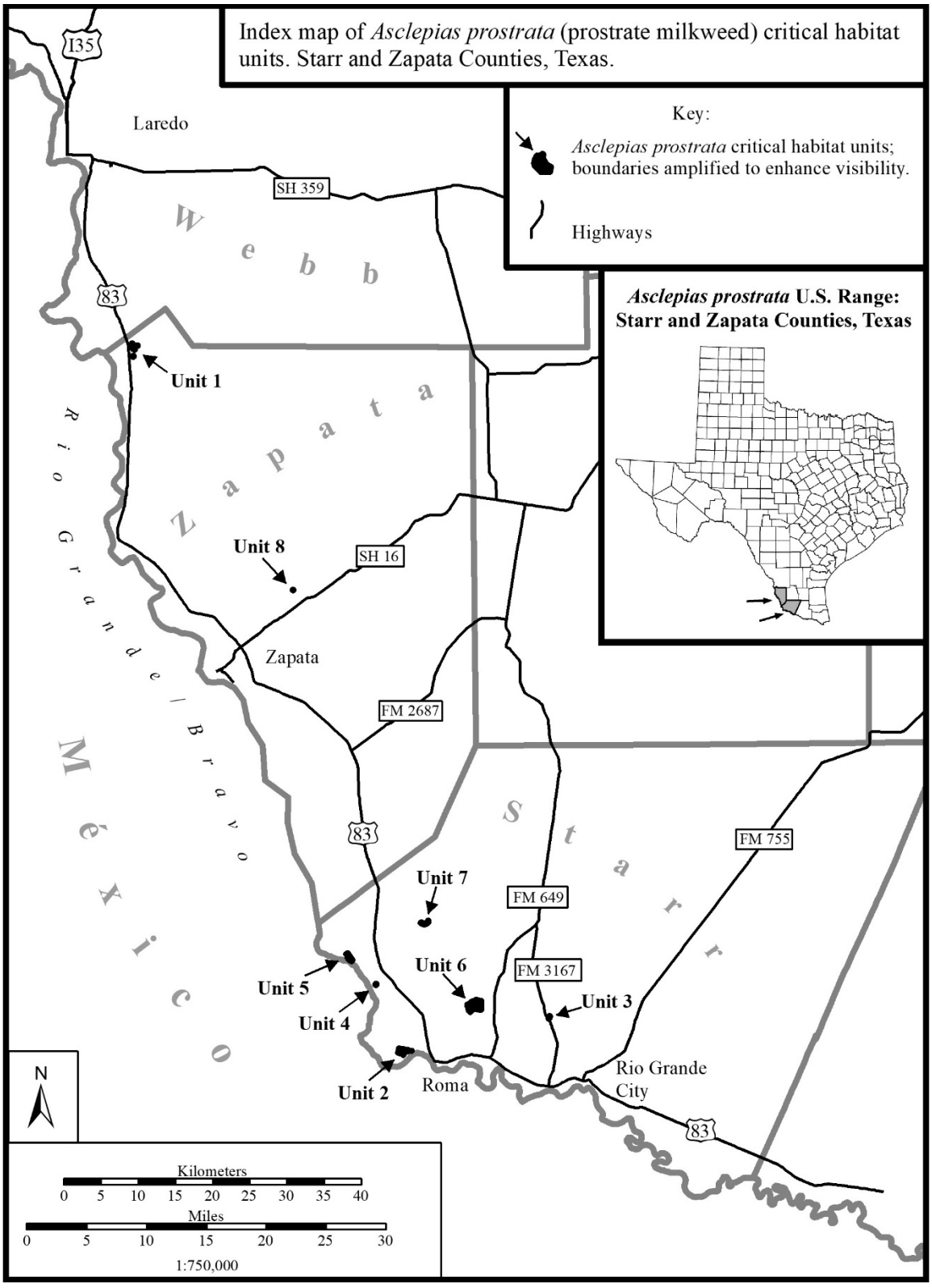
(4) Data layers defining map units were created using Texas Natural Diversity Database (2019–2020) survey data of the documented *Asclepias prostrata* locations in the United States to determine the geological formations and soil types they occupy.

(i) We used the Esri ArcMap software to overlay the geographic coordinates of populations on a digitized map of Texas surface geology and a digitized soil survey map. We then clipped those areas of potential to lands that have documented populations of *Asclepias prostrata*.

(ii) The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.fws.gov/office/texas-coastal-ecological-services*, at *https://www.regulations.gov* at Docket No. FWS-R2-ES-2021-0041, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

Figure 1 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (5)

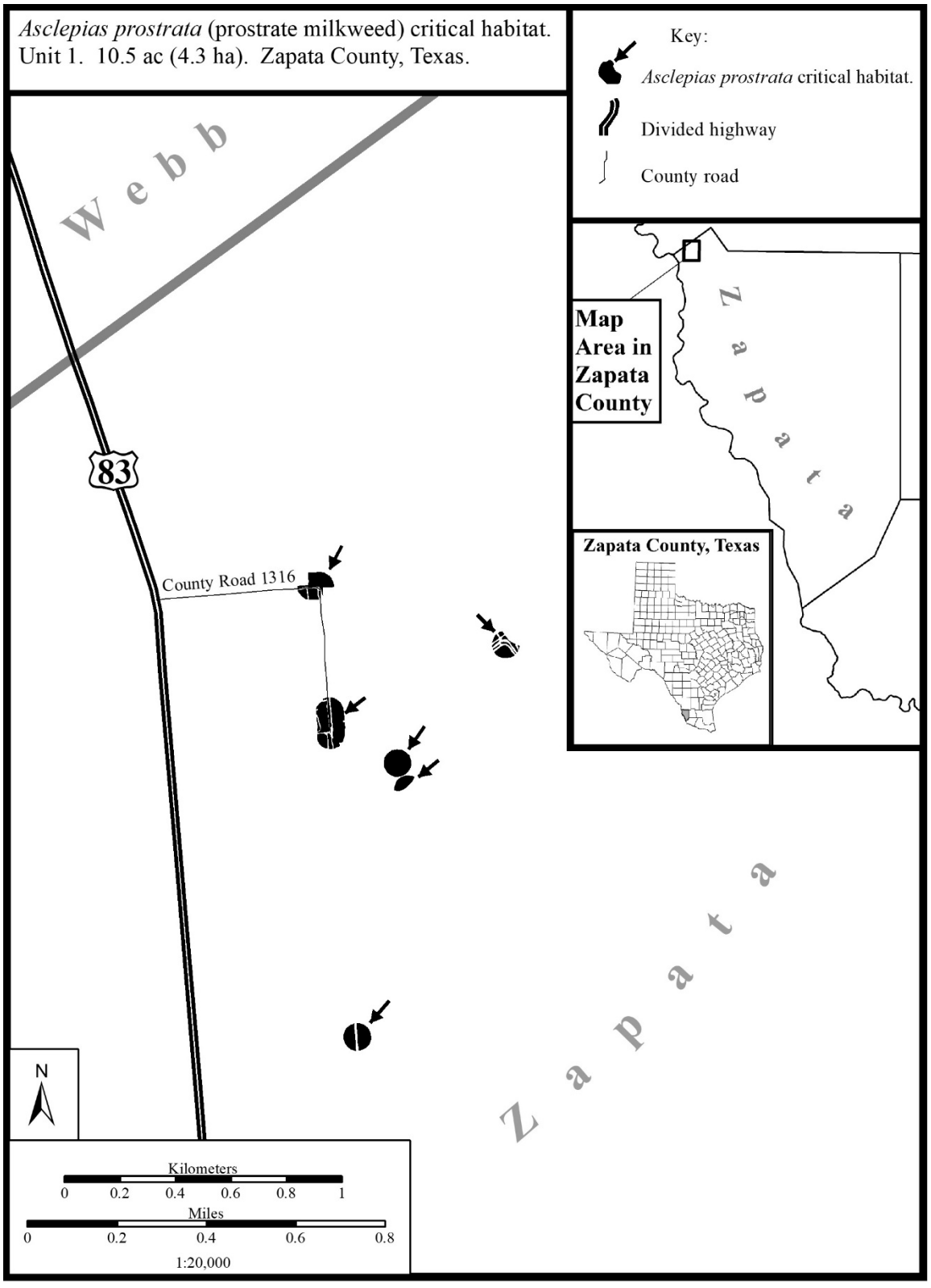

Index map of *Asclepias prostrata* (prostrate milkweed) critical habitat units. Starr and Zapata Counties, Texas.
Key:
Asclepias prostrata critical habitat units; boundaries amplified to enhance visibility.
Highways
Asclepias prostrata U.S. Range: Starr and Zapata Counties, Texas
I35
Laredo
SH 359
Webb
83
Unit 1
Zapata
Unit 8
SH 16
Zapata
FM 2687
Río Grande/Bravo
México
83
Starr
FM 755
Unit 7
FM 649
Unit 6
FM 3167
Unit 5
Unit 3
Unit 4
Unit 2
Roma
Rio Grande City
83
N
Kilometers
0 5 10 15 20 25 30 35 40
Miles
0 5 10 15 20 25 30
1:750,000

(6) Unit 1: Zapata County, Texas.

(i) Unit 1 consists of 6 areas totaling 10.5 ac (4.3 ha) east of U.S. Highway 83 in northwest Zapata County. This unit is on private land and a county road right-of-way.

(ii) Map of Unit 1 follows:

Figure 2 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (6)(ii)

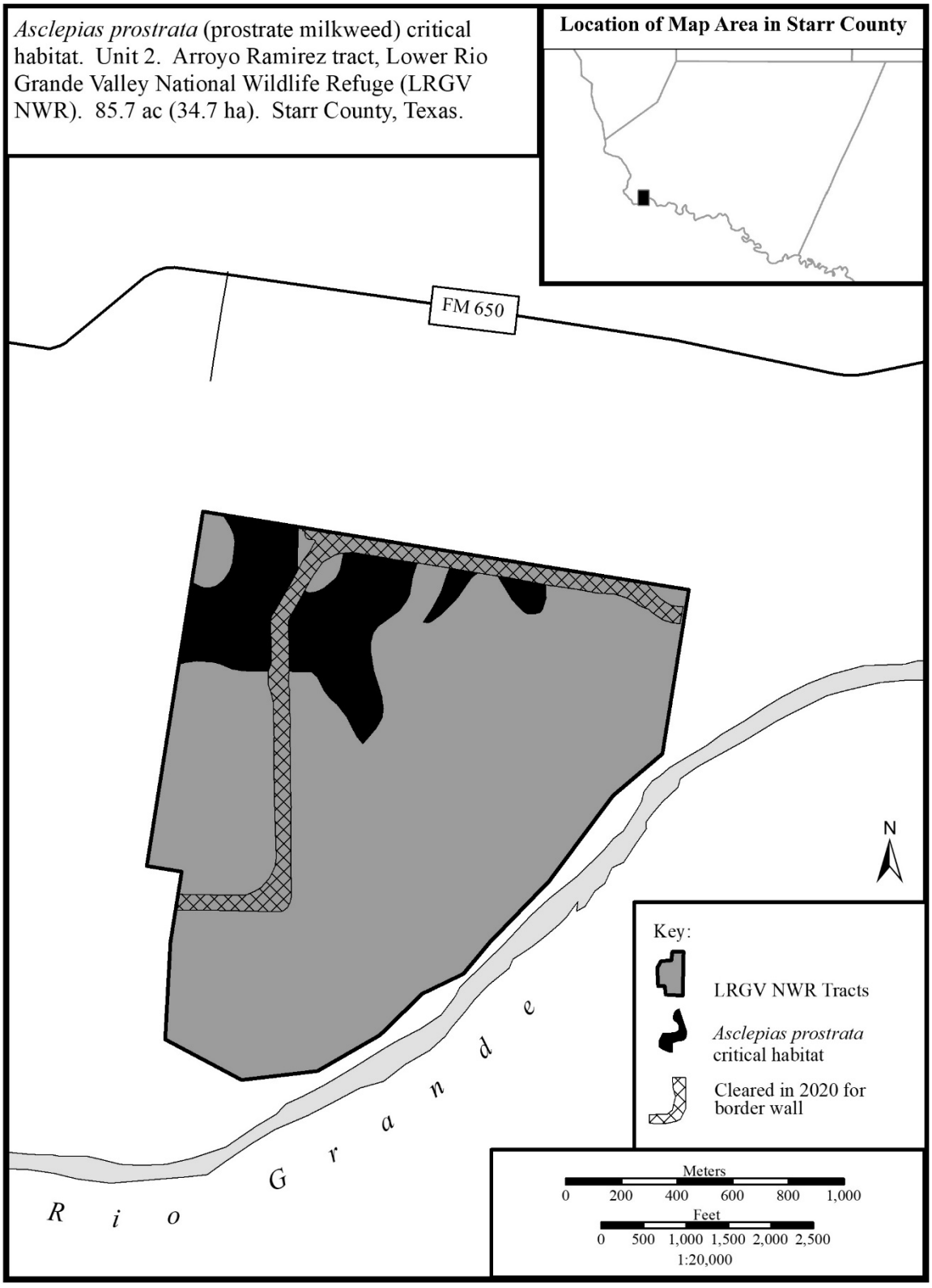

Asclepias prostrata (prostrate milkweed) critical habitat.
Unit 1. 10.5 ac (4.3 ha). Zapata County, Texas.
Key:
Asclepias prostrata critical habitat.
Divided highway
County road
Webb
Zapata
Map Area in Zapata County
Zapata County, Texas
83
County Road 1316
Zapata
N
Kilometers
0 0.2 0.4 0.6 0.8 1
Miles
0 0.2 0.4 0.6 0.8
1:20,000

(7) Unit 2: Starr County, Texas.

(i) Unit 2 consists of 85.7 ac (34.7 ha) in the Arroyo Ramirez tract of Lower Rio Grande Valley National Wildlife Refuge. This unit is in southwestern Starr County adjacent to the Rio Grande on the U.S.–Mexico border. The entire unit is on land owned and managed by the Service.

(ii) Map of Unit 2 follows:

Figure 3 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (7)(ii)

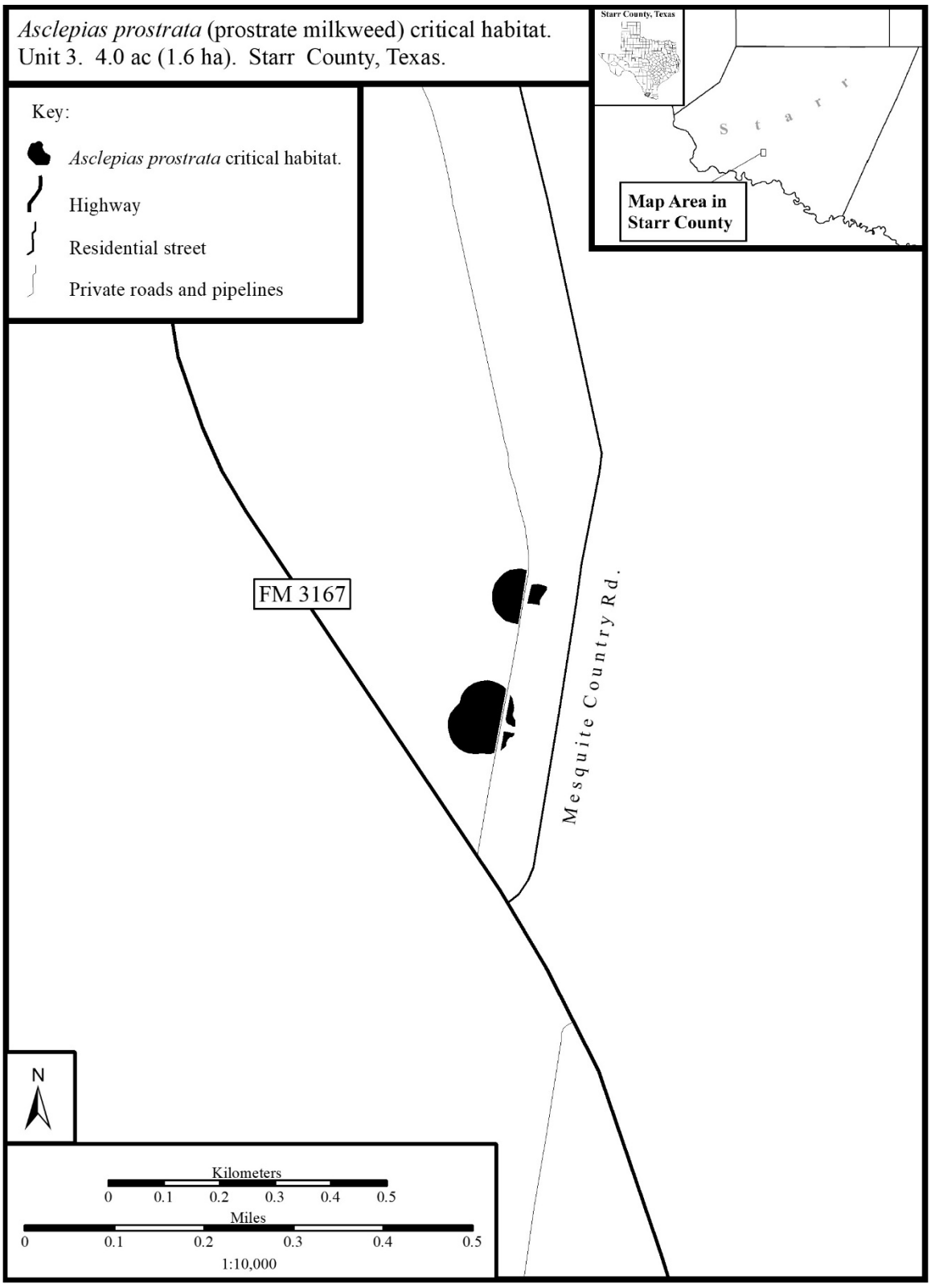

Asclepias prostrata (prostrate milkweed) critical habitat. Unit 2. Arroyo Ramirez tract, Lower Rio Grande Valley National Wildlife Refuge (LRGV NWR). 85.7 ac (34.7 ha). Starr County, Texas.
Location of Map Area in Starr County
FM 650
R i o G r a n d e
N
Key:
LRGV NWR Tracts
Asclepias prostrata critical habitat
Cleared in 2020 for border wall
Meters
0 200 400 600 800 1,000
Feet
0 500 1,000 1,500 2,000 2,500
1:20,000

(8) Unit 3: Starr County, Texas.

(i) Unit 3 consists of 4.0 ac (1.6 ha) along both sides of a road right-of-way on private land in southern Starr County.

(ii) Map of Unit 3 follows:

Figure 4 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (8)(ii)

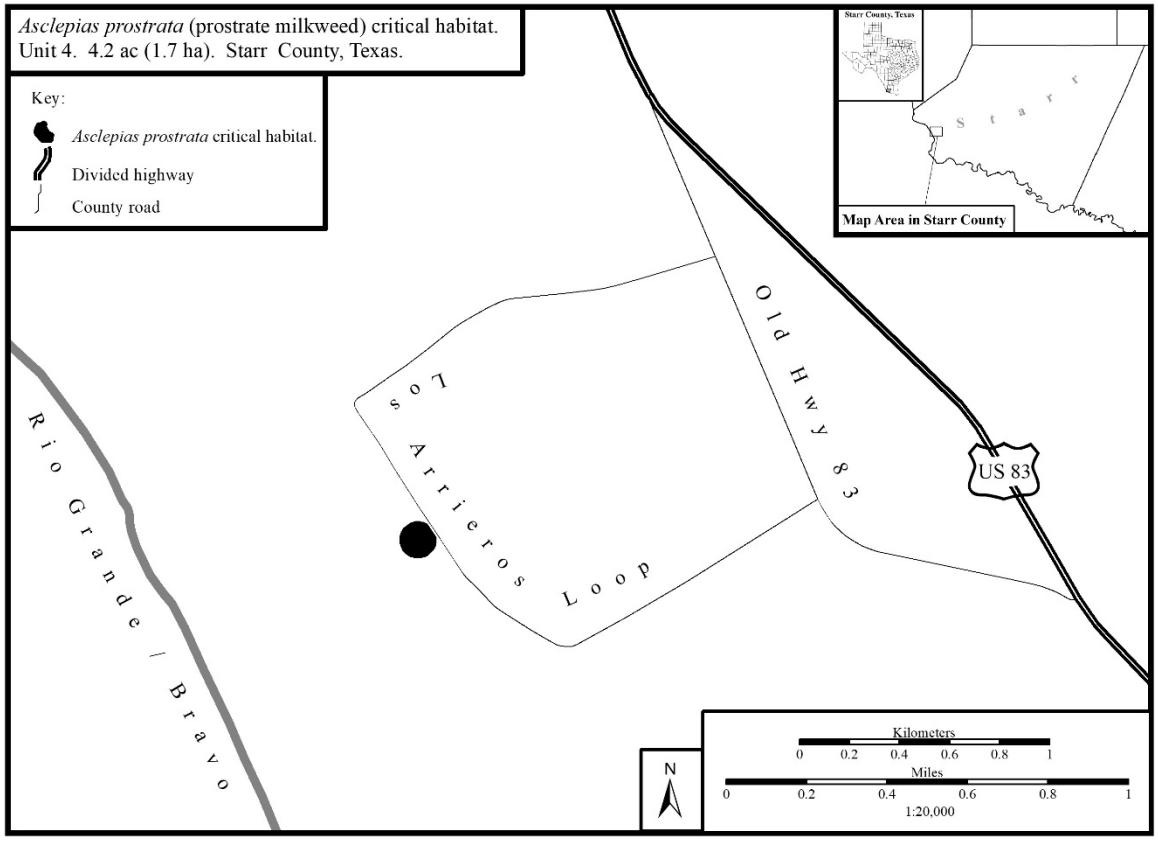

Asclepias prostrata (prostrate milkweed) critical habitat.
Unit 3. 4.0 ac (1.6 ha). Starr County, Texas.
Key:
Asclepias prostrata critical habitat.
Highway
Residential street
Private roads and pipelines
Starr County, Texas
Starr
Map Area in Starr County
FM 3167
Mesquite Country Rd.
N
Kilometers
0 0.1 0.2 0.3 0.4 0.5
Miles
0 0.1 0.2 0.3 0.4 0.5
1:10,000

(9) Unit 4: Starr County, Texas.

(i) Unit 4 consists of 4.2 ac (1.7 ha) along the unpaved right-of-way of Los Arrieros Loop, a county road in southwestern Starr County.

(ii) Map of Unit 4 follows:

Figure 5 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (9)(ii)



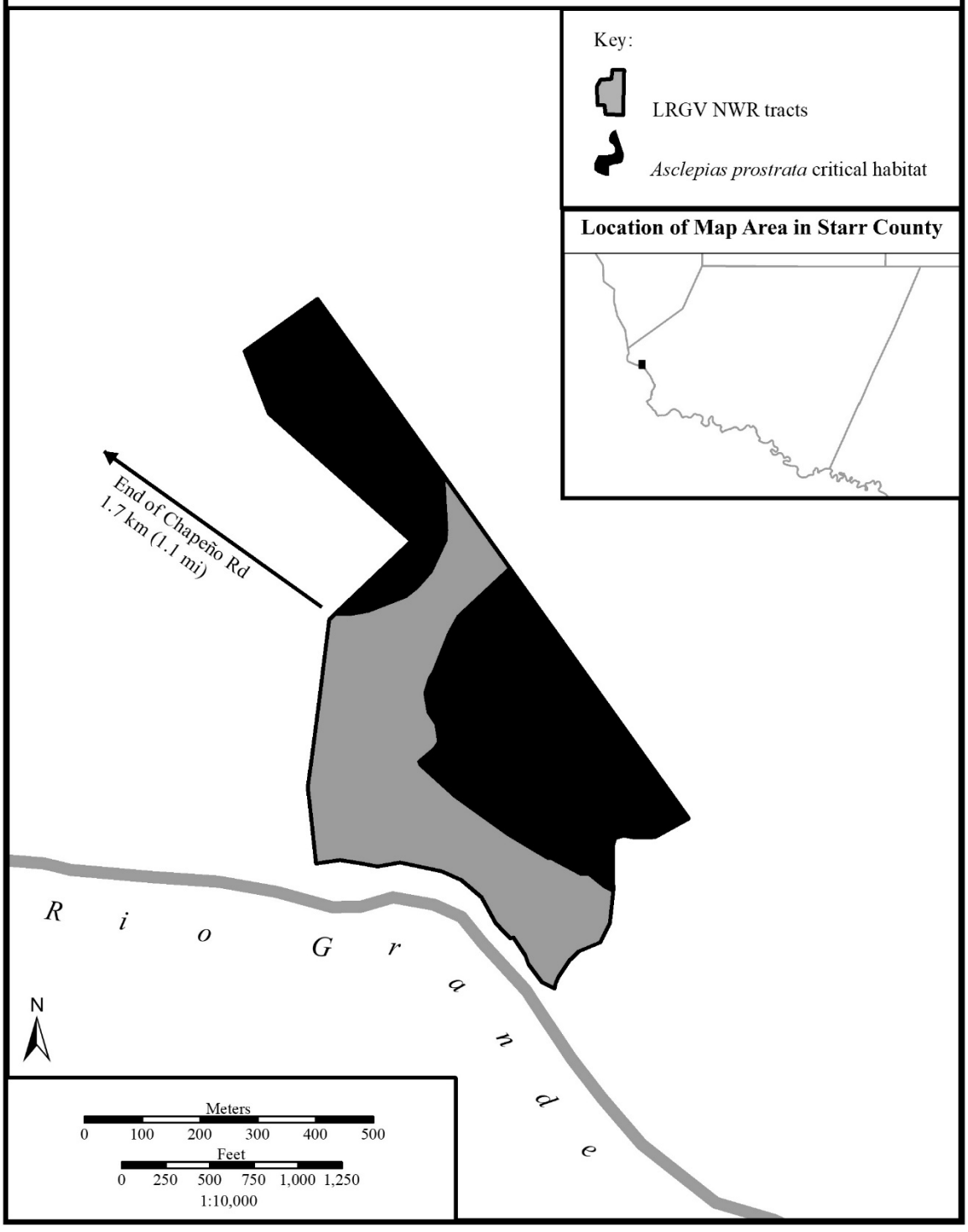
(10) Unit 5: Starr County, Texas.

(i) Unit 5 consists of 51.9 ac (21.0 ha) in the Arroyo Morteros tract of the Lower Rio Grande Valley National Wildlife Refuge. This unit is in western Starr County adjacent to the Rio Grande on the U.S.–Mexico border. The entire unit is on land owned and managed by the Service.

(ii) Map of Unit 5 follows:

Figure 6 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (10)(ii)

Asclepias prostrata (prostrate milkweed) critical habitat.
Unit 5. Arroyo Morteros tract, Lower Rio Grande Valley National Wildlife Refuge (LRGV NWR). 51.9 ac (21.0 ha). Starr County, Texas.



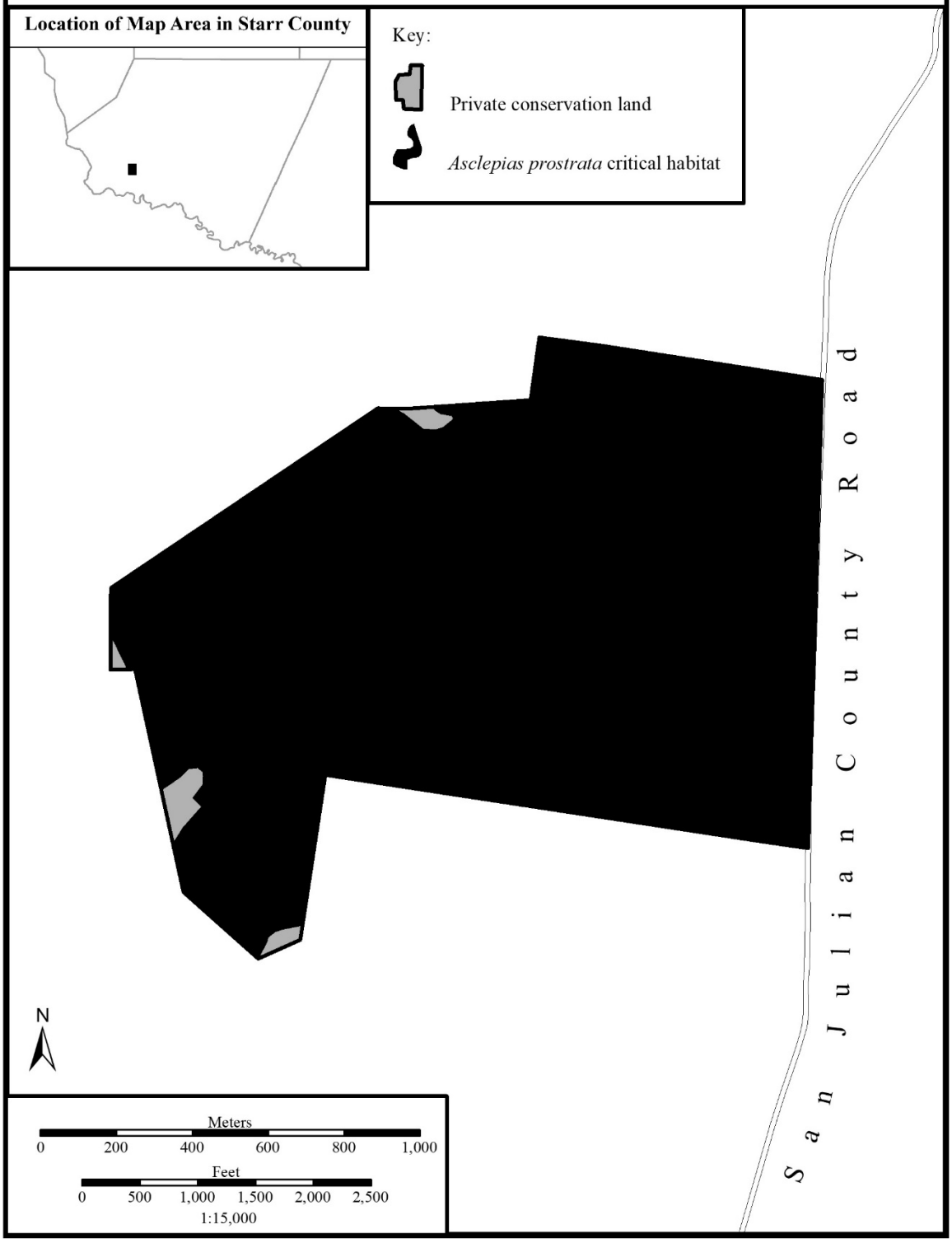
(11) Unit 6: Starr County, Texas.

(i) Unit 6 consists of 484.3 ac (196.0 ha) entirely on privately owned land and the adjacent right-of-way of San Julian Road. This unit is in western Starr County.

(ii) Map of Unit 6 follows:

Figure 7 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (11)(ii)

Asclepias prostrata (prostrate milkweed) critical habitat.
Unit 6. 484.3 ac (196.0 ha). Starr County, Texas.

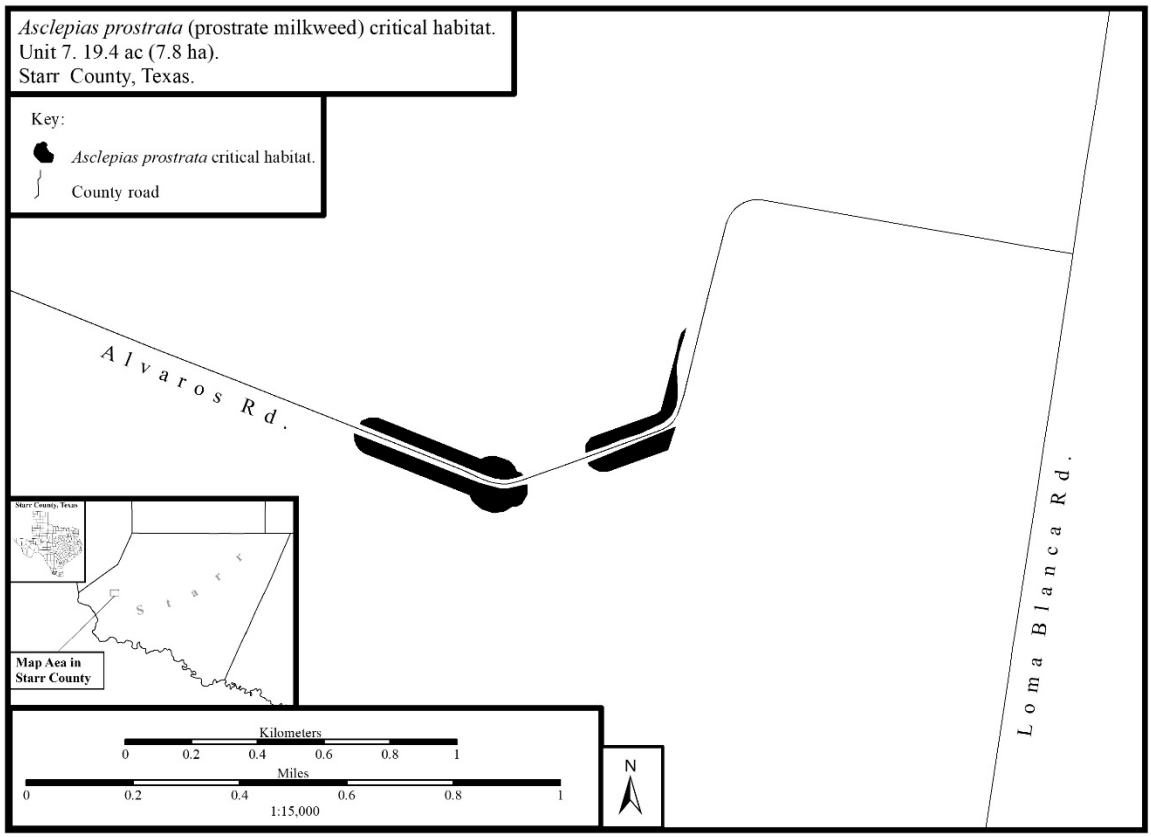


(12) Unit 7: Starr County, Texas.

(i) Unit 7 consists of 19.4 ac (7.8 ha) along both sides of a right-of-way and adjacent private land in western Starr County.

(ii) Map of Unit 7 follows:

Figure 8 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (12)(ii)



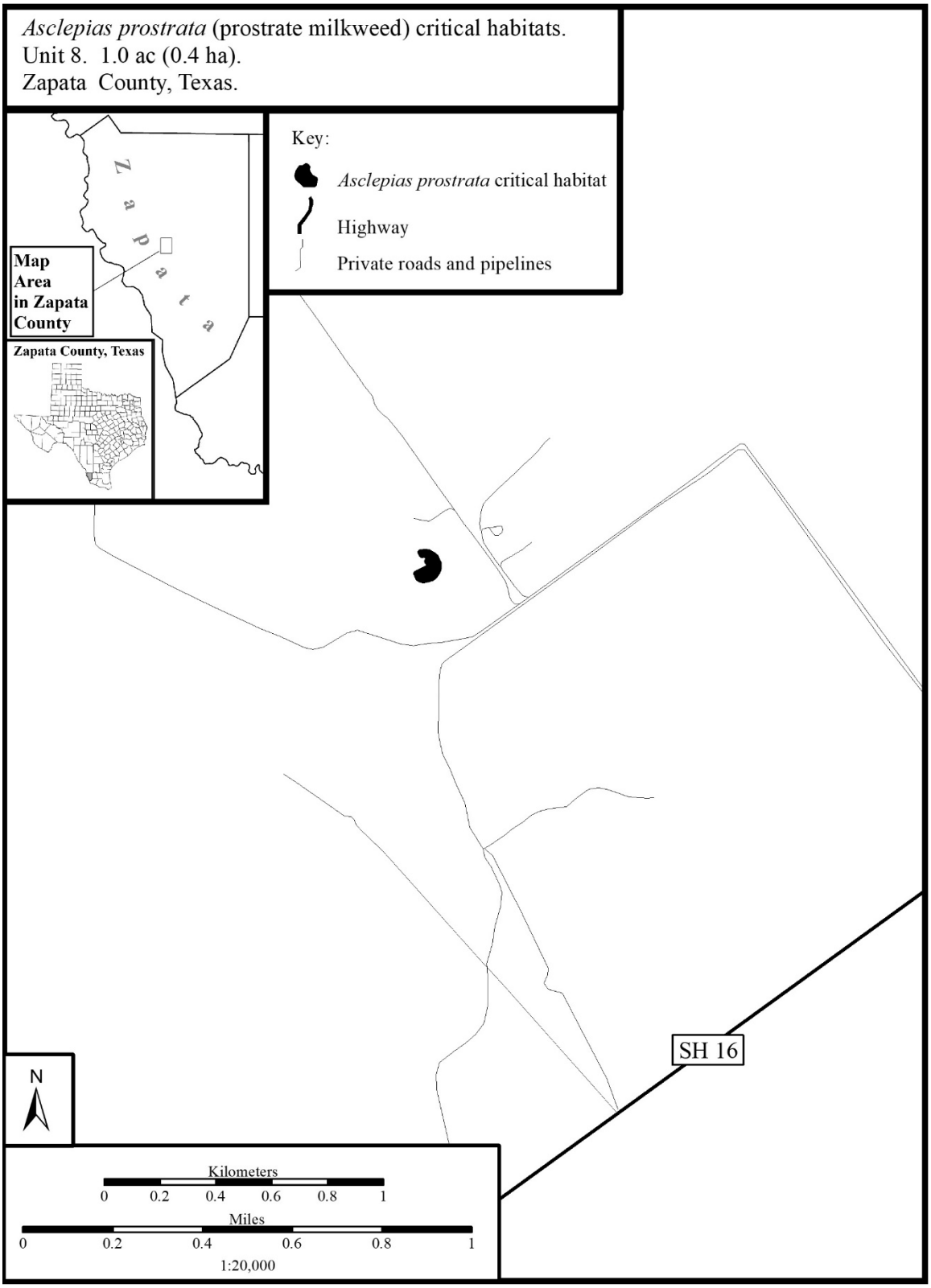
(13) Unit 8: Zapata County, Texas.

(i) Unit 8 consists of 1.0 ac (0.4 ha) on private land in central Zapata County.

(ii) Map of Unit 8 follows:

Figure 9 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (13)(ii)

Asclepias prostrata (prostrate milkweed) critical habitats.
Unit 8. 1.0 ac (0.4 ha).
Zapata County, Texas.



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Wendi Weber,
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U.S. Fish and Wildlife Service.

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